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IN THE

Supreme Court of the United States

October Term, 1951

No. 708

JAMES B. ARMSTRONG, *Petitioner,*

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND SUPPORTING BRIEF

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The petition of James B. Armstrong prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on January 17, 1952 in two renegotiation cases involving the years 1943 and 1944.

The cases were consolidated by the Court of Appeals for Appendix, briefing and argument and one opinion was rendered by the Court.

Opinions Below

The judgment, findings of fact and conclusions of law of the Tax Court are printed in the record (R. 54-73) and were reported in 15 T. C. 625. The opinion of the United States Court of Appeals has not been reported but is set forth in the record (R. 238-239).

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C. A. Section 1254(1).

Statute Involved

The statute involved is the Renegotiation Act of 1943—Act of February 25, 1944, c. 63, Title VII, sec. 701(b), 58 Stat. 78, and the pertinent provisions thereof are printed in Appendix A annexed to this petition.

Question Presented

The question presented turns on the interpretation of subsection 403(a)(5)(B) of the Renegotiation Act of 1943: Whether the petitioner was subject to renegotiation as a "subcontractor" within the meaning and purview of said subsection (a)(5)(B).

STATEMENT OF THE CASE

Renegotiation proceedings for the years 1943 and 1944 were initiated by the Navy Department against the petitioner as a subcontractor within the meaning and purview of Subsection 403(a)(5)(B) of the Renegotiation Act of 1943 (R. 110).

Petitioner contested said renegotiation on the ground that he is a bona fide commission salesman, engaged in selling to commercial concerns only, and does not come within the category of persons which said subsection of the Act was specifically designed and intended by Congress to embrace, namely, the so-called war brokers or Washington Agents engaged in the procurement for their principals of Government contracts or subcontracts.

The petitioner has been a salesman of steel products for more than 35 years. He began his career with a training course at Bethlehem Steel Company, where he learned the different methods of production and familiarized himself with steel products and the various uses to which they are put. For several years he continued in the employment of the Sales Department of that Company, specializing in the sale of drop forgings, steel castings and pig iron (R. 89-91).

In about 1926 he went into business for himself as a sales representative of companies producing drop forgings and steel castings. He opened an office in New York City and since about 1933 he has acted as a sales representative on a commission basis of concerns manufacturing steel forgings and castings, including Endicott Forging & Manufacturing Company of Endicott, New York, maker of drop forgings, Hartford Electric Steel Corporation of Hartford, Conn., producer of carbon steel castings and Cooper Alloy Foundry Company of Hillside, New Jersey, maker of fine steel alloys, including stainless steel, Monel metal and nickel castings (R. 88, 91-93).

Petitioner's territory has always covered the Metropolitan area of New York, including Long Island, northern New Jersey, eastern New York and western New England (R. 91-93). He has one employee, a secretary-stenographer and pays all his own expenses. He assumes no credit risks and all billings and collections are handled by his principals (R. 88, 94, 142, 143).

Petitioner performs the usual duties of a commission salesman. He calls on customers, endeavors to maintain their good-will, ascertains their requirements and secures, if possible, purchase orders for his principals' products (R. 94). If he makes a sale it is evidenced by a printed order form. The order itself usually develops from a request by the customer for a quotation for making a desired article. The plant then estimates the cost of the work based on material and labor costs and other pertinent factors. The price is then quoted to the customer and, if the quotation is satisfactory, the order is placed. In connection therewith it is necessary to obtain such details, specifications or blue prints as may be required to execute the order (R. 131, 149).

Petitioner follows up the orders, endeavors to adjust complaints and reports to his principals any questions regarding the filling of orders, delivery dates, substitution of materials or other difficulties (R. 94, 95, 150-151).

Petitioner's employment contracts with his principals have always been oral. He is not a graduate engineer and does not perform any engineering or technical services for his customers and has no contract or arrangement with his principals to do so (R. 102).

The principal and largest customers served by petitioner and his employers include such concerns as General Electric, American Car & Foundry, Worthington Pump & Machinery Company, Chicago Pneumatic Tool Company, Bigelow Carpet Company, Wright Aeronautical, International Paper Company, and many other manufacturing concerns located in his territory (R. 148, 220). He has

been selling to most of his customers for long periods of time, extending in some instances as far back as thirty years (R. 97-98, 100).

Petitioner's compensation is strictly on a commission basis and his earnings are based directly on the volume of sales as covered by the invoices each month (R. 135, 143).

His rate of commissions on sales of carbon steel products for Endicott Forging & Manufacturing Company, Hartford Electric and Roxbury Steel was approximately 5%. His commissions on sales of fine steel alloys for Cooper Alloy Foundry Company ranged from about 5 to 10% (R. 155, 195, 198, 199). A substantial part of the commissions petitioner received in 1943 and 1944 was on sales that had a war-end use and approximately 87% of such commissions were earned at a rate of not exceeding 5% (R. 195, 199).

During the years in question, petitioner did not solicit or attempt to procure for his principals any Government business nor was he ever instructed by them to do so. He did not call on or communicate with any representative or any employee or official of any Government Department or any Agency of the United States Government in the effort to secure business for his principals from such persons. He had no understanding with any of his principals that it was part of his job to call on any such Agencies or procurement officers. His compensation was not conditioned on his getting such orders or making sales to any Governmental Departments or Agencies. He had no Washington Office and never went to Washington on business (R. 108, 114-115, 118, 131, 132, 161, 177, 179).

It was petitioner's duty to solicit business from his regular customers only and most of the business he brought in was produced from them. He sold only to commercial concerns and it was no part of his duties to solicit business from anyone other than commercial concerns (R. 148, 168, 178-179, 185).

Each of petitioner's principals was renegotiated for the years 1943-1944 (R. 162, 179, 187). Each of said principals reported the commissions which had been paid to petitioner as part of its selling expenses in accordance with the system of cost accounting regularly employed by the company (R. 172, 179, 187). Said commissions were not disallowed, reduced or excepted to in any way (R. 163, 180, 187, 188).

The above statements of fact are consistent with the pertinent findings of fact by the Tax Court (R. 55-60) as adopted by the Court of Appeals.

Petitioner appealed to the Tax Court for redetermination *de novo* of "unilateral determinations" by the Navy Department of excess profits alleged to have been received by petitioner during the years 1943 and 1944, respectively. The Tax Court found that during the years in question the petitioner had realized excessive profits of $22,500 and $6,750, respectively, without application of tax credits. Upon petition to the Court of Appeals for a review of the decisions of the Tax Court said decisions were, by per curiam opinion of the court, affirmed (R. 240).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is of major importance to innumerable sales representatives throughout the country engaged in selling, on a commission basis, their principal's products which may have a so-called war-end use. The seriousness of the decision becomes apparent in view of the situation generated by the Korean war and the resultant war production and by the inclusion in the Renegotiation Act of 1951 of a provision almost identical with subsection (a)(5)(B) of the Act of 1943 (subsection 1213(g)(3), Renegotiation Act of 1951; 50 U. S C. A. Appendix, sections 1211-1233.

2. The broadening of this statutory provision to include bona fide commission salesmen should not be permitted unless clearly sanctioned by judicial interpretation. Unless such interpretation is had uncertainty and confusion will exist among thousands of commission salesmen throughout the country, and among their employers and those charged with the administration of the Renegotiation Act, as to whether or not such salesmen's earnings are subject to renegotiation separately or as part of their principals' selling expenses. The question involved is one of substance and should be settled by this Court.

3. With deference and respect for the decision of the Court below, petitioner believes that objective weighing of the testimony before the Congressional Committees of those requesting the enactment of said subsection (a)(5)(B), the unequivocal statements made by the sponsors of the legislation and in the Reports of the House and Senate Committees, impel one to conclude that it was the clear intent and avowed purpose of Congress to incorporate said subsection into the Act for the sole purpose of subjecting to renegotiation so-called war-brokers or Washington agents by classifying them as subcontractors. (See Appendix B, hereto annexed.) The legislative history of (a)(5)(B) is absolutely devoid of any reference to the intended application of said provision to bona fide commission salesmen.

4. The lower court erred, therefore, in not giving due consideration to the numerous categorical expressions made by those persons directly concerned with the enactment of the measure, particularly the Committee Chairmen. (See Appendix B, pages 35 to 37.) Such statements clearly reveal the specific purpose and design of the legislation and are important guides to construction. As this court recently said in *Schwegmann Brothers* v. *Calvert Distillers Corporation,* 341 U. S. 384, at page 394:

"It is the sponsors that we look to when the meaning of the statutory words are in doubt."

5. Admittedly, the purchase orders secured by petitioner were subcontracts as defined in subsection (a)(5)(A) of the Renegotiation Act of 1943. Under the law, those were subcontracts held by petitioner's principals. Said principals, and not the petitioner, were the subcontractors. It is contended that petitioner's commissions derived from such sales orders were properly renegotiable as part of his principals' selling expenses. The lower court was thus in error in failing to give weight to the fact that in the renegotiation proceedings instituted against petitioner's principals, the commissions paid to petitioner were properly reported by his principals as part of their selling expenses and were not excepted to, reduced or disallowed in any way by the renegotiating authorities. The decision of the court below, in also subjecting petitioner personally to renegotiation, is at variance with the administrative interpretation of the Act and enlarges and extends the provisions of subsection (a)(5)(B) to a scope not justified by the language used in the light of its legislative history.

6. The sole authority relied upon by the Tax Court is *Providence Wool Combing Company* v. *Secretary of War*, 14 T. C. 979. That case had to do only with the interpretation of said subsection (a)(5)(A) and had no bearing whatever on the question of coverage presented herein under subsection (a)(5)(B). If, as the court below seemed to hold, the coverage of (a)(5)(A) was broad enough to include the activities of this petitioner, then the enactment of (a)(5)(B) was entirely unnecessary. It is elementary that Congress does not enact legislation unnecessarily.

7. As this court observed in *Lichter* v. *U. S.*, 334 U. S. 742, at page 787; the recovery by the Government of ex-

cessive profits under the Renegotiation Act is in the nature of the regulation of maximum prices under war contracts or the collection of excess profit taxes. In this controversy petitioner stands in the position of a tax-payer. In *Gould* v. *Gould,* 245 U. S. 151, 153, the Court re-emphasized the established rule that tax laws are not to be extended by implication nor enlarged to embrace matters not specifically pointed out and, in case of doubt, are to be construed most strongly against the Government and in favor of the citizen. (See also *U. S.* v. *Merriam,* 263 U. S. 179.) Any departure from this strict rule of construction to the prejudice of Constitutional guarantees cannot be justified by claimed war-time exigencies. *Ex Parte Milligan,* 4 Wall 2; *U. S.* v. *Hirabayashi,* 320 U. S. 81, 110. Therefore, the decision of the Court below is at variance with important decisions by this Court and it is in the public interest that the scope of subsection (a)(5)(B) of the Renegotiation Act of 1943 be now re-surveyed and clearly marked by this court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF FOR PETITIONER

Opinions Below

A statement of the opinions of the Courts below appears on page 2 of the foregoing petition and is, by reference, adopted as part of this brief.

Basis for Jurisdiction

A statement showing the ground upon which the jurisdiction of this court is invoked is set forth on page 2 of the preceding petition, and is also, by reference adopted as part of this brief.

Statement

The material facts have been set forth in the Statement of the Case at pages 3 to 6 of the foregoing petition and such statement is likewise, by reference, adopted as part of this brief.

ARGUMENT

POINT I

The Court below has misinterpreted subsection 403(a)(5)(B) of the Renegotiation Act of 1943.

Respondent has contended in these proceedings that since petitioner's commissions were conditioned upon his securing for his principals purchase orders, which were defined as subcontracts under subsection (a)(5)(A) of the Renegotiation Act, he received contingent fees within the meaning of subsection (a)(5)(B) of the Statute. It is petitioner's contention that respondent has wrongfully interpreted and wrongfully applied said subsection (a)(5)(B); that said provision was specifically designed by Congress to apply to contingent fee contracts entered into by so-called war brokers or Washington agents (more recently termed "5 Per centers" or "Influence Peddlers") with respect to the procurement by them for their principals of both contracts and subcontracts with the Government. Petitioner takes the position that said subsection was not intended to apply to or interfere with the employment contract of a bona fide commission salesman such as petitioner who, for many years, has been engaged in the legitimate business of selling his principals' products to commercial concerns only and has never been engaged in the solicitation or procurement of Government business.

The lower courts, in upholding respondent's construction of the Act, have given subsection (a)(5)(B) a coverage which, the petitioner contends, is completely at variance with the expressed aim and purpose of the legislation.

Under such circumstances, this Court has said that the court may look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its aim and purpose.

Church of the Holy Trinity v. *U. S.*, 143 U. S. 457, 461;
Ozawa v. *U. S.*, 260 U. S. 178, 194.

In that connection, it has also been stated that the Court may take into consideration the evils at which the legislation was aimed, the title of the act, the testimony presented at the hearings of the Congressional Committees, the Reports of the Committees, the debate in the House and Senate, and the statements made by those sponsoring the legislation and those requesting its enactment.

Church of the Holy Trinity, supra;
United States v. *St. Paul M. & M. Railroad*, 247 U. S. 310, 318.

Careful examination of the legislative history of subsection (a)(5)(B) clearly discloses what was in the mind of Congress when the legislation was enacted and furnishes conclusive evidence to support petitioner's interpretation of the statute.

The provision had its genesis in H. R. 1900 and was enacted into law on July 9, 1943 as Public Law 149, 78th Congress. The title of the bill has significance. The bill was entitled: "An Act to prevent the payment of excessive fees or compensation in connection with the negotiation of war contracts."

It is common knowledge that the legislation resulted from the investigation by the House Naval Affairs Committee (the so-called Vinson Committee) into the intense activities in Washington, at the outset of World War II, of so-called "war brokers" and "Washington agents" and the exorbitant fees they were receiving for procuring Government contracts or subcontracts for their principals. (See Report of Hearings pursuant to H. R. 30, Vol. 1, 78th Congress, First Session.)

The Act was "the product of a period" and, as this Court said in *United States* v. *Union Pac. Ry. Co.*, 91 U. S. 72, 79:

> "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

The report of the hearings of the Vinson Committee shows that the testimony of a number of those "war brokers" or "Washington Agents" was taken. It appears from such testimony that most of them had only recently opened their offices in Washington or in other procurement centers. They sold almost entirely to the Government and did practically no commercial selling. Some of them, in correspondence with prospective clients, claimed to have influence with Government officials and boasted of their ability to influence the drawing of specifications and to have their principal's articles placed on procurement schedules. Representatives of the Army and Navy and other Government Departments also appeared before the Committee and testified as to the evils to be remedied and the specific purpose of the proposed legislation. It thus clearly appeared from all this testimony that the so-called "Washington Agent" or "war broker" was the type of broker the legislation was aimed at.

The House Committee, in reporting out the bill, succinctly stated the purpose of the legislation and the need for it as follows (Report No. 353, 78th Cong., 1st Sess., dated April 12, 1943):

> "* * * The purpose of the legislation is to clarify the present definition contained in section 403(a)(5), by expressly including certain types of contracts or arrangements as 'subcontracts' for the purpose of renegotiation.
>
> * * *

"In hearings just concluded before the House Naval Affairs Committee, * * * considerable evidence was presented to the committee which demonstrated the unconscionable profits being realized by numerous manufacturers' agents or 'war brokers' in connection with the procurement of Government contracts."

At the hearings on H. R. 1900 before the Senate Naval Affairs Committee on May 12, 1943, Mr. Vinson appeared before the Committee and, in referring to the work of the House Committee, said at page 3:

"We have had before the committee, through the efforts of our staff, a great many of these war brokers, and the fees they have been making here have been of such a character that it is shocking to the country. Those are the brokers we are trying to reach."

The legislative intent to remedy those evils by enacting H. R. 1900 and placing the 5 Per Centers in a special category of subcontractors under subsection (a)(5)(B) of the Renegotiation Act was tersely stated by Mr. Vinson on the floor of the House as follows (Congressional Record, page 3629):

"Its sole purpose is to bring these war brokers under the jurisdiction and scrutiny of the renegotiation statute by classifying them as subcontractors."

In speaking on the measure in the Senate, Senator Walsh made this brief explanation of its intended application (Congressional Record, June 15, 1943, page 5865):

"The bill applies only to persons who have made tremendous sums of money by using their influence, personally and politically, to obtain contracts from our Government."

At the hearings before the House Naval Affairs Committee the language of H. R. 1900 was discussed almost word by word. Representatives of the War and Navy Departments were present and assisted in the drafting of the legislation. Their interpretation of the proposed measure is clearly disclosed by their testimony.

Mr. H. S. Hensel, Chief, Procurement Division, Navy Department, in emphasizing the type of contingent fee contract or arrangement at which the legislation was aimed, said (Hearings, Volume 1, page 278):

> "Here is the point. We are trying to reach contracts or arrangements by which agents have to be paid commissions largely for soliciting business from the United States. That is the type of contract we are trying to reach."

There is ample evidence that what Congress had in mind in enacting subsection (a)(5)(B) was to cover what was termed the "war brokerage" type of business, that is, the solicitation by war brokers or 5 Per Centers for their principals of prime contracts or subcontracts under prime contracts. It was clearly brought out before the Vinson Committee that there was much more activity among such brokers in connection with the awarding of subcontracts under prime contracts than in the awarding of the comparatively few prime contracts.

Mr. Hensel, beginning at page 258, had pointed out the advantages of having (a)(5)(B) embrace subcontracts as well as prime contracts inasmuch as the prime contractors normally did not employ any contingent-fee agents but many contingent-fee agents were involved in the procuring of subcontracts from large prime contractors. He also pointed out that the excessive contingent-fee problem was probably more concerned with the solicitation and procuring of subcontracts than prime contracts.

Lt. Col. R. A. Cutter, speaking for the Army Services Force, stated that (a)(5)(B) would be effective in helping

to control the "war brokerage" type of business (Appendix B, page 31).

With reference to the $25,000 exemption contained in the statute, Mr. Hensel testified at page 267:

> "It is limited to this type of contract that we are looking at, the contingent fee contract."

Mr. Jacob E. Davis, Special Assistant to the Secretary of the Navy, in testifying about the contingent fee problem created by the war brokers, told the Committee, at page 233:

> "The great majority of the agents were originally employed by their principals because of their familiarity with Government procurement methods, their 'know how' in the Government, rather than because of their familiarity and experience with the products they were attempting to sell."

The legislation also received the endorsement of other Departments of the Government. In a letter addressed to Chairman Vinson, Mr. E. S. Land, Chairman of the Maritime Commission, called attention to the purpose of H. R. 1900 and the evils it was designed to eradicate, in the following words (Exhibit 608, page 399):

> "The proposed legislation is aimed at what the Commission regards as an evil, which should be eradicated as far as possible. These 'brokers' or 'agents' charging contingent fees for procuring government contracts render little or no actual service, and are for the most part engaged in selling what they do not possess—influence over the actions and discretion of Government officials. * * *"

For the convenience of the Court, there is annexed to this brief an Appendix B, containing pertinent excerpts from the hearings before the House and Senate Com-

mittees and from their reports on H. R. 1900; also excerpts from statements by the sponsors of the legislation and from the testimony by Departmental representatives who sought its enactment. This material furnishes much additional evidence of the legislative intent with respect to the particular aims of the bill. It abounds with such expressions as: "War Brokers", "Washington Agents", "fraternity of war brokers", "Washington representation", "procurement of Government business", etc. The Appendix also contains specific statements by the House Committee on Ways and Means and the Senate Finance Committee that the $25,000 exemption provided for in subsection 403(c)(6) of the Renegotiation Act of 1943 related to "war contract brokers" or "war broker contracts" (pp. 37-38).

All of the proof mentioned above was called to the lower court's attention. It makes crystal clear that the avowed object of (a)(5)(B) was to subject to renegotiation the so-called "war brokers" or "5 Per Centers", by classifying them as "subcontractors". To repeat the statement of Chairman Vinson, that is all there was to the measure.

The record of the progress of H. R. 1900 through Congress can be searched in vain for any indication that subsection (a)(5)(B) was intended to apply to bona fide commission salesmen such as the petitioner. On the contrary, it was conclusively brought out in testimony before the House Committee, by a witness in petitioner's particular line of business, that the legislation was not intended to embrace such salesmen.

Mr. Robert Heppenstall, President of Heppenstall Company of Pittsburgh, Pennsylvania, manufacturer of heavy forgings, testified that he had about fourteen sales agents and that the products they sold had a war-end use. In addition his company had a Washington agent—the firm of Shirley, Olcott & Nichols. Heppenstall was being questioned about his willingness to have his contract with

Shirley, Olcott & Nichols renegotiated. He replied that he did not think it would be fair to renegotiate them unless all of his sales and commission people were renegotiated. To that Chairman Vinson replied:

> "We haven't anything in the world to do with what you pay to commission salesmen to sell to some commercial concern. That is a matter of business between you and your sales agents and your commercial houses that you sell to. We are not concerned about that and they are not analogous propositions in any way at all, * * *. We are not trying to regulate that." (Hearings on H. R. 1900, House Committee on Naval Affairs, March 25, 1943, pages 217-218, 227-228.)

It is respectfully submitted that the court below was in error in reaching the conclusion that petitioner came within the category of persons which subsection (a)(5)(B) of the Renegotiation Act of 1943 was designed to encompass.

The Opinion of the Lower Court

The instant cases are both (a)(5)(B) cases. However, the Tax Court appears to have confused renegotiation under (a)(5)(B) with renegotiation under (a)(5)(A). It adopted respondent's contention that "within the thought of the adjudicated cases", the petitioner came within the coverage of the Act (R. 66). Those "adjudicated cases" were not named. The sole authority relied upon by the Tax Court is *Providence Wool Combing Company* v. *Secretary of War,* 14 T. C. 979. That case was concerned only with the interpretation of (a)(5)(A) and has no bearing whatever upon the question of coverage here presented. The *Wool Combing* case simply held that (a)(5)(A) applied to the lower tiers of purchase orders

or subcontracts as well as to the first tier of any such orders or subcontracts. Examination of the decision in that case discloses that the "legislative hearings" there referred to were only concerned with the incorporation into (a)(5)(A) of the broad definition of a subcontract urged by some of the Departments. The *Grob Brothers* and *National Electric Machine* cases cited in that portion of the *Wool Combing* opinion quoted by the Tax Court were also (a)(5)(A) cases (R. 68).

If, as the court below seems to hold, the coverage of (a)(5)(A) was broad enough to include the activities of petitioner, then the enactment of (a)(5)(B) was entirely unnecessary. It is elementary, however, that legislative language is deemed to have had some purpose.

Furthermore, acceptance of respondent's contention necessarily leads to the conclusion that prior to the enactment of subsection (a)(5)(B) the earnings of bona fide commission salesmen were precluded from renegotiation. There is nothing in the legislative history of (a)(5)(B) to indicate that such was the case. On the contrary, as will hereinafter be shown in Point II of this brief, earnings of a bona fide commission salesman were already subject to renegotiation under the act.

As an indication that the Tax Court may not sufficiently have examined into the legislative history of (a)(5)(B), the following language is quoted from its decision:

> "* * * Though there are to be found various expressions in the hearings before Congressional Committees with reference to what the petitioner calls Washington agents, war brokers and 5 percenters, and we have no doubt that they were intended to be included perhaps primarily under the statute, from an examination of the whole history of this matter we are not convinced that petitioner's activities do not come within the range and purview of the statute and the intendment of Congress" (R. 67).

As to the various "expressions" before the Congressional Committees:—as appears from Appendix B to this brief, those "expressions" included numerous categorical statements by the Committee Chairmen and by representatives of the various Departments as well as explicit statements contained in the Committee Reports and made on the floor of the House and Senate. All of those "expressions" emphasized that the evils aimed at by the specific enactment of (a)(5)(B) were the "5 Per Centers" and their contingent fee arrangements which had resulted in "tremendous and unconscionable profits" to them.

As to the Court's statement that such "war brokers and 5 Per Centers" were intended to be included, "perhaps, primarily" under the statute, the report of the hearings before the Committees will be searched in vain for any indication of an intent to include bona fide commission salesmen within the coverage of subsection (a)(5)(B). That the war brokers and 5 Per Centers were definitely the people at whom the statute was exclusively aimed is made unmistakably clear by the statements of Senator Walsh and Mr. Vinson, briefly quoted on page 15 of this brief and more fully set forth on pages 35 to 37 of Appendix B hereto annexed.

The concluding portion of the sentence to the effect that the court was "not convinced" that the petitioner's activities do not come within the language and purview of the statute" is both at variance with the court's findings regarding the nature of petitioner's employment and indicative of some lingering doubt as to the applicability of the statute to him. As summarized on pages 3 to 6 of the foregoing Petition, the Court found in effect that petitioner's activities did not remotely resemble those of the "war brokers" or "5 Per Centers". Respecting the negative statement by the Court that "it is not convinced" that the petitioner is not covered by the Act, it is submitted that a negative statement in that manner of the court's conclusion is inadequate. To justify the taking

of substantial sums from this petitioner, it was error for the Court not to find that undoubted authority did exist in law for the renegotiation of petitioner by the respondent.

Reference was made in the foregoing petition (page 7) to the observation of this court in *Lichter* v. *U. S.*, 334 U. S. 742, 787, that the Renegotiation Act is in the nature of a tax statute. As this court said in *Gould* v. *Gould*, 245 U. S. 151, at page 153:

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

Applying to the instant cases the doctrine of *Gould* v. *Gould*, it is submitted that the lower court erred in failing to conclude that respondent had unmistakable authority to renegotiate this petitioner.

POINT II

The decision of the Lower Court is at variance with the administrative interpretation of the Renegotiation Act.

Before (a)(5)(B) was incorporated into the statute, Section 403 (d) of the Renegotiation Act of 1942 provided that, in renegotiating a contract price or determining excessive profits, no allowance should be made for any salaries, bonuses, or other compensations paid by a contractor or subcontractor to its officers or employees in excess of a reasonable amount.

On March 31, 1943 the War, Navy and Treasury Departments and the Maritime Commission promulgated a Joint Statement of "Purposes, Principles, Policies and Interpretations" under the Renegotiation Act of 1942. The statement set forth, at page 7 thereof, "The General Principles Followed and Factors Considered" in determining the existence of excessive profits in connection with the renegotiation of war contracts. On page 9 of the Joint Statement, there were also set forth "Interpretations of the Statute" by the several "Departments" and the Maritime Commission. The Joint Statement is not in evidence in these proceedings but this court had occasion to consider it in *Lichter* v. *U. S.*, 334 U. S. 743, and the Court is respectfully requested to take notice of the "Joint Statement" in the instant cases. (See Report of Hearings before the House Committee on Naval Affairs, 78 Cong., 1st Sess., 1943, Vol. 2, pages 1025-1039.)

This court pointed out in the *Lichter* case at pages 774 and 783, that the Joint Statement above referred to was considered by the appropriate Congressional Committees at their hearings on the proposed Renegotiation Act of 1943, and that the administrative practice shown in the Joint Departmental Statement was substantially incorporated into the statute.

Therefore the administrative interpretation placed on the Act by those charged with its execution are, we believe, particularly pertinent to its construction and entitled to considerable weight.

Paragraph J-PAB-8, at page 21, of the Joint Statement, provided as follows:

> "8. **Contracts with Manufacturers' Representatives.** Contracts between manufacturers and their representatives are subject to renegotiation as subcontracts when the representative is performing, or agrees to make available on request, engineering, mechanical, or other services related to the perform-

> ance of one or more prime contracts with one of the Departments or subcontracts thereunder, * * *. These activities comprise 'part of the work required for the performance of another contract' within the definition of subcontract in the renegotiation statute. * * *"

This court has said that the word "when" carries substantially the same meaning as "if" and is frequently employed as equivalent to the word "if" in legislative enactments and in common expressions. *U. S.* v. *Willings*, 8 U. S. 48, 54.

It stands admitted in this proceeding that the petitioner rendered no engineering or technical services for his customers and had no agreement with his principals to do so (R. 86-87). It is submitted, therefore, that the lower court was in error in failing to give weight to the Departmental interpretations of the Act set forth above and in failing to hold that petitioner was not renegotiable as a manufacturers' representative.

Petitioner has claimed in these proceedings that, although there is no statutory authority to renegotiate him individually, his commissions were properly subject to review as part of his principal's selling expenses in the renegotiation proceedings had against them.

Section 381.4 of the Renegotiation Regulations provides as follows:

> **"381.4 Profit, Cost Allocation and Allowance—General**
>
> "(1) Profit. The term 'profits derived from contracts with the Departments and subcontracts' is defined by the Act as the excess of the amounts received or accrued under contracts and subcontracts over the costs paid or incurred with respect thereto. The term 'costs' includes selling, general and administrative expenses."

Section 403(a)(4)(B) of the Renegotiation Act of 1943 directs that such "costs" shall be determined "in accordance with the method of cost accounting regularly employed by the contractor in keeping his books" (Appendix A, page 27).

Salesmen's commissions are, of course, proper items of selling expense. In that respect, Paragraph J-PAB-5(f), on page 20 of the Joint Statement, contains this interpretation:

> "5. (f) Salaries, wages and other compensation.—Subsection (d) of section 403 provides that 'in renegotiating a contract price or determining excessive profits * * * the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount.' * * * Reasonableness of compensation is determined only within broad limits, and weight is given to the determination by the company of the value to it of the services of any officer or employee."

The evidence is undisputed in the instant proceedings that each of petitioner's principals were renegotiated for the years 1943 and 1944. Endicott Forging & Manufacturing Company was renegotiated by the Army Air Force; Hartford Electric and Roxbury Steel Casting and Cooper Alloy Foundry Electric were renegotiated by the Navy Department (R. 162, 179, 187).

Each of petitioner's said principals reported the commissions which had been paid to him as part of their selling expenses in accordance with the system of cost accounting regularly employed by the company (R. 172, 179, 187). Said commissions were not disallowed, reduced or objected to in any way (R. 163, 180, 187, 188).

The fact that the commissions paid to petitioner were not questioned or disturbed in the renegotiation proceed-

ings against his principals indicates strongly that the renegotiating agencies considered his compensation to be legitimate items of selling expense and reasonable compensation for his services.

Conclusion

The lower court was in error in holding that petitioner was subject to renegotiation as a subcontractor within the meaning and purview of subsection 403(a)(5)(B) of the Renegotiation Act of 1943.

Respectfully submitted,

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WILLIAM F. KELLY
P. J. J. NICOLAIDES
RICHARD L. NICOLAIDES
Counsel for Petitioner

APPENDIX A

Statute Involved

Renegotiation Act of 1943—Act of Feb. 25, 1944, c. 63, Title VII, sec. 701(b), 58 Stat. 78.

Sec. 403(a) • • •

(4)(B) The term "profits derived from contracts with the Departments and subcontracts" means the excess of the amount received or accrued under such contracts and subcontracts over the costs paid or incurred with respect thereto. Such costs shall be determined in accordance with the method of cost accounting regularly employed by the contractor in keeping his books, • • •.

• • •

(5) The term "subcontract" means— • • •

(B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts: • • •.

Sec. 403(c) * * *

(6) This subsection shall be applicable to all contracts and subcontracts to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, * * * unless * * * the aggregate of the amounts received or accrued in such fiscal year * * * under subcontracts described in subsection (a)(5)(B) do not exceed $25,000 for such fiscal year.

APPENDIX B

I

(a)

Excerpts from Hearings of House Naval Affairs Committee on H. R. 1900, Pursuant to H. R. 30, Vol. 1

Opening statement of Robert E. Kline, Jr., General Counsel for the Committee, at the public hearings conducted on H. R. 1900 in March and April, 1943 (Vol. 1, pages 1-4):

"* * * Mr. Chairman, the committee will recall that early last summer, in a series of hearings, considerable testimony was adduced to the effect that excessive contingent fees and commissions were being received by certain Washington sales representatives or 'War Brokers' in connection with the procurement of Government business. * * *

"Supported by the War and Navy Departments, the Committee reported out a bill (H. R. 7304), which sought to outlaw the payment of contingent fees in connection with Government procurement. The bill was passed by the House on July 20, went to the Senate, and was referred to the Senate Naval Affairs Committee. There a considerable lobby developed against it. * * * The net result was that the House bill died in the Senate committee.

"The Chairman still feels, however, that something must be done to remedy this contingent-fee situation, and, as he stated when he introduced H. R. 1900 (which was referred to this committee for consideration), he had adopted a different approach, in the hope that it will meet with favorable consideration and prompt enactment by both the House and Senate.

> This time the proposed legislation which is designed to eliminate the exorbitant profits being realized by these Washington sales agents and so-called engineers, by expressly including them within the definition of 'subcontractor' in the renegotiation statute. * * * That is the purport of the substitute bill which is now before you in committee print form.
>
> * * *
>
> "In order to bring before this committee a sample of what is going on right here in the city of Washington, I have subpoenaed to appear before you a number of these agents. * * *
>
> * * *
>
> "We have here before us a committee print of a bill that I have prepared to correct this situation, to correct the evil of these exorbitant fees being paid to brokers. * * * *"

At page 279, Mr. H. Struve Hensel, Chief, Procurement Division, Navy Department, emphasizing the type of contingent fee contract or arrangement at which the legislation was aimed, stated as follows:

> "* * * We are trying to reach contracts or arrangements by which agents have to be paid commissions largely for soliciting business from the United States. That is the type of contract we are trying to reach."

Referring to the $25,000 exemption provided for subcontractors as defined in the bill, Mr. Hensel had also said, at page 267:

> "* * * It is limited to this type of contract that we are looking at, the contingent-fee contract."

Concluding the discussion with reference to the $25,000 exemption, Chairman Vinson remarked, at page 295:

> "* * * If he makes over $25,000 then he is brought within—or then the fraternity of war brokers can know that they have a free limit up to $25,000 before the Department steps in to make any inquiry about their influence or anything in connection with it."

At page 298, Lt. Col. R. A. Cutter of the Army Services Force stated his endorsement of the measure as follows:

> "* * * A measure of this type would be effective in helping to control the war brokerage type of business, and we recommend it."

And at page 301 Chairman Vinson also made this statement:

> "* * * If we can classify these war brokers as subcontractors we have gone a long way to put the hand of the Government over their earnings."

Mr. E. S. Land, Chairman of the United States Maritime Commission, in a letter addressed to Chairman Vinson and put into the record as Exhibit 608 (page 399) made this statement:

> "The purpose of the substitute (bill) is to make subject to renegotiation contingent fees and compensation for securing war contracts from Government agencies. This would be accomplished by broadening the definition of the word 'subcontract' so as to include agreements for the payment of such fees, and by reducing the exemption for this particular form of 'subcontract' so that incomes of over $25,000 per year from such 'subcontracts' would be subject to renegotiation.
>
> "The proposed legislation is aimed at what the Commission regards as an evil, which should be

eradicated as far as possible. These 'brokers' or 'agents' charging contingent fees for procuring government contracts render little or no actual service, and are for the most part engaged in selling what they do not possess—influence over the actions and discretion of government officials. * * *"

(b)

Excerpts from Hearings Held May 12, 1943 Before the Senate Committee on Naval Affairs on H. R. 1900

Mr. Vinson, Chairman of the House Naval Affairs Committee testifying before the Senate Committee stated, at page 3:

"We have had before the (House) committee, through the efforts of our staff, a great many of these war brokers, and the fees they have been making here have been of such a character that it is shocking to the country. Those are the brokers we are trying to reach.

"It never was intended to try to wipe out a legitimate brokerage business, a brokerage business that was on a legitimate basis, and where the custom or trade that made it necessary to so operate. So to eliminate any doubt about the matter we have approached it entirely from the viewpoint that was suggested in correspondence with the distinguished chairman and myself, by which we recognize that these agents have a right to do business, but we want to control them and classify them as subcontractors, with the privilege of renegotiating their contracts. That is the whole theory of it in a nutshell."

At pages 6 and 7, he stated further:

> "* * * the bulk of them do not do a thing in the world, just come down here and tell the Navy Department they represent so and so, and the Navy Department draws specifications somewhat to fit their articles, and then they get a contract. * * *
>
> "* * * The bulk haven't anything in the world; they have just their offices in their hats."

Mr. Hensel of the Navy Department also testifying before the Senate Committee, stated at page 11:

> "* * * As to these brokers, we are going at them directly. We do not care whether the corporation is absorbing it out of surplus or not. We want to cut down the highpaid brokers from the morale end of it. We do not want corporations to pay men $200,000 or $300,000 for a supposed 'know how' in getting around Washington."

Mr. Jacob B. Davis, also of the Navy Department, testifying before the Senate Committee stated, at page 17:

> "The great majority of the agents were originally employed by their principals because of their familiarity with Government procurement methods, their 'know how' in the Government, rather than because of their familiarity and experience with the products they were attempting to sell."

II

Extract From Report of the House Committee on Naval Affairs, 78th Congress, 1st Session, No. 353, Dated April 12, 1943

"* * * The purpose of the legislation is to clarify the present definition contained in section 403(a)(5), by expressly including certain types of contracts or arrangements as 'subcontracts' for the purpose of renegotiation.

Need for Legislation

"In hearings just concluded before the House Naval Affairs Committee, which were in effect a continuation of hearings held early last summer on the same subject, considerable evidence was presented to the committee which demonstrated the unconscionable profits being realized by numerous manufacturers' agents or 'war brokers' in connection with the procurement of Government contracts.

"Several of these agents appeared before the committee and testified at length. Their fees and commissions, based upon a percentage of Government business obtained, were so excessive as to become scandalous and shocking to the public conscience. It was revealed that the incomes of these selling agencies, comparatively modest in pre-war years, in many instances had skyrocketed well into six figures in 1941 and 1942. Potential and projected earnings were indicative of even more astronomical figures for 1943.

"It was shown that the amounts being paid to these agents in selling commissions and fees in respect to subcontracts were at least as great as the amounts being paid in connection with prime contracts. All of this expense, of course, must ultimately be borne by the taxpayers.

"Each agent was questioned regarding the nature of his services. It was developed that these services consisted primarily of ordinary salesmanship, although in some cases they were of a more technical nature. Most of them performed certain functions in addition to the obtaining of Government contracts—they secured necessary priorities, discussed changes, expedited payments, and generally 'serviced' the contracts. Even in these cases, however, the agents were seldom more than intelligent conveyors of detailed information. They seldom performed engineering services in the strict sense; indeed, they usually were not qualified, either by education or experience, to do so. Many of the agents only opened their offices and began business in Washington at the beginning of the emergency period, attracted by the rich possibilities of making large profits in connection with the tremendously increased volume of Government business."

III

Extracts From Remarks of the Committee Chairmen in the Debate on H. R. 1900 in the House and Senate

Mr. Vinson, Chairman of the Naval Affairs Committee, speaking on the bill on the floor of the House of Representatives on April 20, 1943 said (Congressional Record, Vol. 89, pp. 3626-3629):

"* * * Mr. Chairman, for the second time within the course of a year, I wish to direct the attention of the House to an evil which, despite the glare of public hearings, the prompt action of this House at the last session, and the increased vigilance of the War and Navy Departments, has continued to flourish until it

has reached such proportions that it threatened to become a public scandal.

"I refer to the enormous amounts in commissions and fees which are being paid to manufacturers' agents, or war brokers, in connection with the procurement of Government contracts. * * * The bill in its present form is designed to control the excessive profits being received by these agents, by defining their arrangements with their principals as subcontracts under the renegotiation statute.

* * *

"For the most part, they were employed in the first place because of their 'know how' in Washington. They know their way about the various procurement offices, and can call or go to see the right official. I am aware that the intricacies of Government procurement may seem a bewildering maze to the small businessman. And do not think that these war brokers have not done all that they can to build up this 'bogey man' of Washington red tape. A number of letters written by these agents were read at the hearings, which emphasized the difficulties of Government procurement, and claimed an experience in dealing with the many problems to be met before orders could be obtained. Some of them even insinuated a certain influence with Government procurement officials. I am convinced that many of these agents have ingratiated themselves with Government officials, by entertaining them and getting on a friendly basis with them.

* * *

"Now, Mr. Chairman, if there are no other questions I think the committee thoroughly understands what this bill is about. Its sole purpose is to bring these war brokers under the jurisdiction and scrutiny of the renegotiation statute by classifying them as subcontractors. * * *"

In the debate on the measure in the Senate on June 15, 1943, Senator Walsh, Chairman of the Naval Affairs Committee remarked as follows (Congressional Record, Vol. 89, pp. 5864-5865):

"Evidence presented to the House Naval Affairs Committee demonstrated that excessive profits or fees were being realized by numerous manufacturers' agents or 'war brokers' in connection with the procurement of Government contracts." • • •

"• • • The representatives of various bureaus testified that the way to reach it was to require that the agent who negotiated for an excessive fee with any contractor to obtain a contract from the Government be made a subcontractor and his fee subject to renegotiation. That is all there is to the bill. If a person collects $200,000 for a $10,000,000 contract, the bill would make him a subcontractor, and the renegotiators would decide how much of the money he had honestly earned, how much was bonus, how much was excessive, and how much was fraudulent. That is all there is to the bill. I would not change the policy or principle of renegotiation. It represents a serious and honest endeavor to reach lobbyists who are making enormous sums of money. If I had the time I would read a list of them.

• • •

"• • • The bill applies only to persons who have made tremendous sums of money by using their influence, personally and politically, to obtain contracts from our Government."

IV

Excerpts From Reports of the House and Senate Committees on the Revenue Bill of 1943 with Reference to the $25,000 Exemption for War Contract Brokers.

The Revenue Bill of 1943 (H. R. 3687; 78th Congress, 1st Session) included a proposed amendment of Section 403(a) of the Renegotiation Act of 1943 by increasing to $500,000 the specific exemption applicable to contracts or subcontracts, other than subcontracts as defined in Section (a)(5)(B). As to the latter, the House Committee on Ways and Means, in reporting out the bill, stated at page 78 (Report No. 871, dated November 18, 1943):

> "The existing specific exemption of $25,000 relating to so-called war contract brokers remains unchanged in the bill."

The report of the Senate Finance Committee on said bill (Report No. 627, dated December 22, 1943) referred at pages 114-115 to the same provision as follows:

> "The committee bill also contains amendments requiring the insertion of these provisions only in contracts or subcontracts (other than so-called war broker contracts) involving an estimated amount of more than $100,000. In the case of war broker contracts, the provision is not required to be inserted if the estimated amount involved is not more than $25,000."

Office - Supreme Court, U. S.
FILED
MAY 2 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 708

JAMES B. ARMSTRONG, *Petitioner,*

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, *Respondent.*

MOTION TO SUBSTITUTE UNITED STATES OF AMERICA AS RESPONDENT IN PLACE OF WAR CONTRACTS PRICE ADJUSTMENT BOARD.

Now comes the petitioner by his attorneys and moves this Honorable Court to substitute the United States of America as respondent in place of the War Contracts Price Adjustment Board, and for reasons therefor states as follows:

1. By Act of Congress of March 23, 1951, 50 U. S. C. A. App. 1231, the War Contracts Price Adjustment Board was abolished.

2. Sub-paragraph (k) of the foregoing paragraph provides, "This section shall take effect sixty days after the date of the enactment of this Act (March 23, 1951)."

3. Sub-paragraph (h) of said paragraph provides in part as follows: "but any court having on its docket a case to which the War Contracts Price Adjustment Board is a party, on motion or supplemental petition filed at any time within twelve months after the effective date of this section, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the United States."

4. There is a necessity for the survival of this proceeding as set forth in detail in the petition for Writ of Certiorari.

5. It is respectfully submitted that the foregoing motion should be granted.

Respectfully submitted,

FREDERICK H. KOSCHWITZ,
WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
RICHARD H. NICOLAIDES,
Counsel for Petitioner.

A copy of the foregoing motion was served upon the United States of America, by leaving a copy thereof at the Office of the Solicitor for the United States, Department of Justice, Washington, D. C. on May 2, 1952.

P. J. J. NICOLAIDES.

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 708

JAMES B. ARMSTRONG, *Petitioner*

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 54-72) are reported at 15 T.C. 625. The *per curiam* opinion of the Court of Appeals (R. 238) is reported at 194 F. 2d 875.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1952 (R. 240). The petition for a writ of certiorari was filed on April 15,

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STATUTE:

Renegotiation Act, as amended (Act of February 25, 1944, 58 Stat. 78, 50 U.S.C. App. 1191 Section 403(a)(5)(B)	2, 4

MISCELLANEOUS:

H. Rep. 353, 78th Cong., 1st sess., p. 6	5

1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether excessive profits resulting from commissions upon sales to war contractors are subject to elimination through renegotiation by virtue of Section 403(a)(5)(B) of the Renegotiation Act, as amended, which makes renegotiable all arrangements "any amount payable under which is contingent upon the procurement" of war contracts "or [is] determined with reference to the amount of such" contracts.

STATUTE INVOLVED

Section 403(a)(5)(B) of the Renegotiation Act, as amended (Act of February 25, 1944, 58 Stat. 78, 50 U.S.C. App. 1191) provides in part as follows:

> The term "subcontract" means
>
> * * * * * * *
>
> (B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or sub-

contracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts * * *.

STATEMENT

This case involves the renegotiation of petitioner's profits for the years 1943 and 1944. During the years in question, petitioner, performing the customary services of a commission salesman under oral arrangement with several steel companies (R. 56), received as his sole basis of compensation commissions upon sales to companies performing prime or subcontracts with the Government (R. 57-58, 238). His net income for the years 1943 and 1944 was $62,648.17 and $38,876.87, respectively, as compared with average earnings of $9,491.02 per year for the four year period, 1936 through 1939 (R. 61). Of this net income, $56,918.69 in 1943 and $25,233.41 in 1944 was earned upon sales having a war end use (R. 60-61). Upon petitioner's application for redetermination, the Tax Court, in an opinion reviewed by the full Court, found his profits for the years 1943 and 1944 excessive in the amounts of $22,500 and $6,750, respectively (R. 63).

The sole basis of the petition for a writ of certiorari is that ordinary commission salesmen are not within the reach of the Renegotiation Act. The court below rejected this argument in a *per curiam* opinion stating its agreement with the "detailed findings" and "exhaustive opinion" of the Tax Court (R. 238-239). The Tax Court held that the statutory language of Section 403(a)(5)(B), *supra,* "covers the petitioner as a subcontractor and that his commissions under the facts before us are subject to renegotiation" (R. 69).

ARGUMENT

It is clear from the findings of the Tax Court, which are not disputed, that petitioner's compensation was "contingent upon the procurement of" and "determined with reference to the amount of * * * subcontracts" subject to the Renegotiation Act (R. 68),[1] and therefore within the precise terms of Section 403(a)(5)(B). The argument is made, however, that despite coverage by a literal application of the statutory language, the Act's legislative history discloses that Congress intended to subject to renegotiation only the earnings, on war contracts, of so-called war brokers and not those of ordinary commission agents.

---

[1] The sales on which he earned his commissions were admittedly war "subcontracts" renegotiable under Section 403(a)(5)(A) (see Pet. 6, 8, 25-6).

We do not quarrel with petitioner's resort to the legislative background for aid in ascertaining the intent of Congress. But when read together with the statutory language, that history makes it plain that Congress never intended to distinguish between so-called war brokers and other agents earning commissions on war contracts. Admittedly, the Congressional debates and reports disclose concern over the unconscionable profits of war-brokers. The evidence falls far short of establishing, however, that only particular types of commission agents were intended to be brought within the Act. In fact, discussion of the evil of exorbitant war brokers' profits is linked without distinction to the earnings of commission agents on war contracts. For example, the Report of the House Committee on Naval Affairs refers in general terms to "manufacturers' agents" and to "amounts being paid to these agents in selling commissions," observes that their "services consisted primarily of ordinary salesmanship," and explains that the proposed statutory provision was "designed to give the departments authority to control the excessive fees and profits being received by these manufacturers' representatives or commission agents, by defining their contracts or arrangements with their principals as 'subcontracts' under the statute dealing with the renegotiation of war contracts" (H. Rep. 353, 78th Cong., 1st Sess., p. 6). It appears, therefore, that

Congress intended to deal with the problem of so-called war brokers by bringing within the scope of renegotiation all commissions on war contracts, thereby subjecting excessive profits to recapture in accordance with the general statutory standards.

There is no evidence whatever, and petitioner does not even contend, that Congress attempted a definition limited to war brokers. Indeed, drawing a line between ordinary commission agents on war contracts and so-called war brokers would have been extremely difficult, if not impossible. Petitioner, nevertheless, would disregard the statutory language and, presumably upon the basis of judicially created standards, have the courts decide in each case whether commissions were paid to a war broker as distinguished from an ordinary commission agent. Authority to renegotiate excessive profits earned as commissions on war contracts would thus depend on the person realizing them—an irrelevant factor in the coverage of other war contractors.

Although the statute has been uniformly administered to apply to brokers like petitioner, no judicial decisions are cited in conflict with the administrative interpretation, which has here been confirmed by the full Tax Court and by the Court of Appeals. Petitioner's argument is so lacking in merit that it apparently has never even been raised in the other cases dealing with the

application of Section 403(a)(5)(B). *Rosner* v. *War Contracts Price Adjustment Board,* 17 T.C. 445; *A. P. Dowell, Jr.,* v. *Forrestal,* 13 T.C. 845; *French* v. *War Contracts Price Adjustment Board,* 13 T.C. 276, appeal dismissed, 182 F. 2d 560 (C.A. 9); *Brady* v. *War Contracts Price Adjustment Board,* 11 T.C. 280; *Wolff* v. *Macauley,* 8 T.C. 146, 12 T.C. 1217; *Greaves* v. *War Contracts Price Adjustment Board,* 10 T.C. 886; *Fine* v. *War Contracts Price Adjustment Board,* 9 T.C. 600; *Iverson & Laux, Inc.* v. *Forrestal,* 6 T.C. 247; *Edward A. Martin Associates, Inc.* v. *War Contracts Price Adjustment Board,* 4 CCF 50970; *Nagel* v. *War Contracts Price Adjustment Board,* 4 CCF 50549.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

October Term, 1951

No. 708

JAMES B. ARMSTRONG,

Petitioner,

against

WAR CONTRACTS PRICE ADJUSTMENT BOARD,

Respondent.

REPLY BRIEF OF PETITIONER

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Renegotiation Act of 1943:

Sec. 403 (a)(5)(A) 3, 7

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WAR CONTRACTS PRICE ADJUSTMENT BOARD,

Respondent.

REPLY BRIEF OF PETITIONER

Statement

In the petition for Writ of Certiorari herein the War Contracts Price Adjustment Board was named as the Respondent. An application by petitioner is now pending before this Court for an order substituting the United States of America as respondent in place of said War Contracts Price Adjustment Board.

Replying to Respondent's Argument

The statement of respondent, at page 4 of his brief, that the sole basis for this petition is that ordinary commission salesmen are not within the reach of the Renegotiation Act, is misleading. It is calculated to create the impression that salesmen's commissions are untouchable under the Act. Such is not the case. It is petitioner's contention that, although there is no statutory authority to renegotiate him individually as a subcontractor, his commissions were, nevertheless, properly reviewable in the renegotiation proceedings against his principals as part of their selling expenses (Pet Brief, pp. 22-25).

Respondent's brief also shows some confusion of thought regarding the subject matter of the instant renegotiation proceedings. They could not be instituted for the purpose of renegotiating petitioner's "compensation" or "earnings," as implied at page 4 of respondent's brief. The Renegotiation Act provides that renegotiation proceedings shall be commenced against *contractors* and *subcontractors* subject to the Act (Subsection 403 (c)(1)) who are required to file reports on the contracts or subcontracts which they hold (Subsection 403 (c)(5)(A)).

It is not denied by respondent that both the proceedings here involved were commenced against the petitioner as a subcontractor under subsection (a)(5)(B) (See R. 12, 110). Nor has it been disputed that petitioner's commissions on his sales were duly and properly reported in the renegotiation proceedings had against his principals and were not objected to in any way. (Petitioner's Brief, p. 6). It is submitted therefore, that, properly speaking, the questions for consideration in this case are: (1) whether the petitioner comes within the category of persons that (a)(5)(B)

was intended to encompass as subcontractors and (2) Did he have any contingent fee contracts with his principals within the meaning of said subsection?

Respondent argues in effect that since petitioner's commissions were conditioned upon his securing for his principals purchase orders which are defined as subcontracts under (a)(5)(A) of the Act, he received contingent fees within the meaning of the Statute. In upholding respondent's contention, petitioner submits that the lower court has followed a mode of construction which the Tax Court had disclaimed in two previous decisions: *Wolff* v. *Macauley*, 8 T. C. 146 and *Fine* v. *War Contracts Price Adjustment Board*, 9 T. C. 600—neither of which was cited in the opinion of the Tax Court in this case.

In *Wolff* v. *Macauley, supra,* the respondent contended that since architects' fees, under subcontracts, were computed at 5% of the construction costs, and their fees on a purchase order, figured at the same percentage of estimated costs, were "determined with reference to the amount of" such subcontracts and purchase order and were, therefore, renegotiable under subsection (a)(5)(B).

In rejecting respondent's contention, the Tax Court declared at page 152, (italics added):

> "* * * *the phrase* 'determined with reference to the amount of such a contract', etc. may not be isolated as the respondent, would have it, but *must be construed in connection with the preceding language and in the light of the purpose sought to be accomplished by Congress.* * * *"

For the same reason, the Tax Court in *Fine* v. *War Contracts Price Adjustment Board,* 9 T. C. 600, rejected a similar contention that the petitioner in that case was a subcontractor under (a)(5)(B) merely because his com-

pensation was based or computed upon the amount of contracts or subcontracts procured for his principals. The court again called attention to the fact that the phrase "determined with reference", etc. may not be isolated from the text of the subsection but relates back to the preceding language.

Construing the phrase "determined with reference", etc. in relation to the preceding language in (a)(5)(B), and "in the light of the purpose sought to be accomplished by Congress" it is petitioner's contention that said subsection has been wrongly interpreted by respondent and wrongly applied to cover a bona fide commission salesman like petitioner who had no contingent fee contract or arrangement to solicit or procure government contracts for his principals, within the meaning and intent of the Renegotiation Act.

As a further indication that (a)(5)(B) was not intended to apply to ordinary commission salesmen, attention is called to the fact that the original approach by Congress to the remedy of the contingent fee problem contemplated the outlawing altogether of all contingent fees (Appendix B, Petitioner's supporting brief, p. 29; also H. R. 7304, 77th Congress, 2nd Session, and House Report No. 2356 accompanying the same). It is inconceivable that Congress would attempt to outlaw the earnings of bona fide commission salesmen.

The assertion on page 5 of respondent's brief to the effect that Congress, in enacting (a)(5)(B), did not intend to distinguish between war brokers and legitimate commission salesmen, could only be made by completely disregarding the very considerable evidence of Congressional intent which is set forth at pages 29 to 38 of petitioner's brief. This evidence makes abundantly clear that said subsection was enacted for the specific and sole purpose

of subjecting to renegotiation only the so-called war brokers by classifying them as subcontractors. Otherwise, the numerous statements of Mr. Vinson, Senator Walsh and those requesting the incorporation of said provision into the Act, would have no significance whatever.

This evidence, much of which is set forth in Appendix B of petitioner's brief, makes crystal clear, despite respondent's assertion to the contrary, that, in discussing the purpose of the measure, the evils which Congress intended to remedy by its enactment were linked only with the activities of the war brokers, their contingent fee contracts or arrangements and the exorbitant fees which they were realizing under them.

In an attempt to substantiate his contention, respondent, at page 6 of his brief, quotes briefly from the Report of the House Committee. However, if important omissions are supplied and the quoted language is placed in proper perspective, those brief extracts are of no help to respondent.

As set forth on pages 34 and 35 of petitioner's brief, the House Report, after pointing out the specific purpose of the measure, recited that at the hearings before the Committee considerable evidence was presented which demonstrated the unconscionable profits being realized by numerous manufacturers agents or "war brokers" in connection with the procurement of Government contracts.

The Report then went on to state (italics added):

> "Several of *these* agents appeared before the Committee and testified at length. *Their fees* and commissions, based on a percentage of business obtained, were so excessive as to become scandalous and shocking * * *."

The report of the Committee hearings discloses that about ten of those "agents" appeared before the Com-

mittee and testified. They were all Washington agents who did practically no commercial selling. It is to be noted that in the report of the hearings and in the debate in Congress, as well as in the testimony of Departmental representatives who testified before the Committee, those Washington Agents are repeatedly referred to as "these agents" or "these brokers" (House Committee on Naval Affairs, Hearings on H. R. 1900 March 25, 1943; also Appendix B to petitioner's brief, pages 29-37).

It is clear, therefore, that the extracts quoted by respondent have application only to war brokers or Washington Five Percenters who, as the report went on to state, "only opened their offices and began business in Washington at the beginning of the emergency period."

The fears raised by respondent, at page 6 of his brief, respecting the difficulty of distinguishing between bona fide commercial salesmen and war brokers are groundless. Most questions of coverage will require the consideration of factual situations, whether the party involved is an individual, a partnership or a corporation. The line of cleavage between the duties of a legitimate commercial salesman, like petitioner, and the activities of the war brokers or influence peddlers is made unmistakably clear by two of the cases cited by respondent on page 7 of his brief, namely *Rosner* v. *War Contracts Price Adjustment Board* 17 T. C. 445 and *Edward A. Martin Associates, Inc.* v. *War Contracts Price Adjustment Board,* 4 CCF 50970.

Each of those cases furnishes an excellent example of the type of contingent fee contract which section (a)(5)(B) was intended to encompass. In the *Rosner* case the petitioner was the "accredited agent" in Washington for a manufacturing concern from 1941 through 1945. His commissions (amounting to approximately $119,000 in

1942) were based on orders received from the United States Maritime Commission and for his work "in connection with the United States Maritime Commission matters and all other departmental work".

Edward A. Martin Associates, Inc. involved a Washington agent who incorporated and claimed unsuccessfully that he was a subcontractor within the meaning of (a)(5)(A). The decision in each of these two cases sets forth the characteristic type of contract or arrangement used by war brokers.

The other cases cited by respondent in his brief are of no assistance to him.

Wolff v. *Macauley*, 8 T. C. 146 and *Fine* v. *War Contracts Price Adjustment Board*, 9 T. C. 600 have already been referred to.

In *Brady* v. *War Contracts Price Adjustment Board*, 11 T. C. 280, the question was whether the renegotiation proceeding had been timely commenced. It appears that the activities of the petitioner were disputed. Brady, a resident of Washington who received a very substantial annual "retainer fee" from a manufacturing concern, claimed to be an engineer and consultant in the field of electronics and a patent attorney in the same field while the Government contended that his chief occupation was the sale for his principal of radar equipment to the Government.

Examination of the records in *Nagel* v. *War Contracts Price Adjustment Board*, 4 CCF 50549, *A. P. Dowell, Jr.* v. *Forrestal*, 13 T. C. 845 and *Greaves* v. *War Contracts Price Adjustment Board*, 10 T. C. 886, discloses that

apparently the petitioner in each of those cases assumed that the respondent had the authority to renegotiate him. There is no indication that inquiry had been made in any of them respecting the legislative history of (a)(5)(B). It is just as reasonable to suppose that each petitioner had failed to familiarize himself with the legislative history of said subsection as to assume that he had done so and chose not to make the contention now advanced by the petitioner in the instant proceeding.

Bert French, 13 T. C. 276 and *Iverson & Laux, Inc.* v. *Forrestal,* 6 T. C. 247, involved direct sales to the United States Navy Supply Department and to the Defense Plant Corporation, respectively, and in each case the Court held that the Act was clearly applicable.

Therefore, the above decisions furnish no support for the respondent's contention in this case.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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